FILE COPY

FILED
JAN 18
CHARLES ELMORE

Supreme Court of the United States

OCTOBER TERM, 1929

No. 363

GEORGIA POWER COMPANY

Petitioner

vs.

CITY OF DECATUR

Respondent

BRIEF OF GEORGIA POWER COMPANY

WALTER T. COLQUITT,
BEN J. CONYERS,
Attorneys for Georgia Power Company.

INDEX

List of cases cited in brief	II
Statement of case	1
Evidence in case undisputed	4
Decree of trial court	5
Decision of the Supreme Court of the State of Georgia	5
Federal question involved	5
Former litigation	6
Question before this Court for its determination	8
Assignments of error	8
Municipal franchise under which the line in question was constructed and being operated has expired and been terminated	9
Discussion of Municipal Rate contract of April 1st, 1903	13
Principle of law announced by this Court in construing Municipal contract	21
Discussion of cases cited by Supreme Court of State of Georgia	24

LIST OF CASES CITED IN BRIEF

Barney vs. Indiana Ry. Co. et al., 61 N. E. 194 (note b).... 22

Blair vs. Chicago, 201 U. S. 400.....6, 11, 13, 14, 18, 20

Brooks-Scanlon Co. vs. Railroad Commission of La., 251 U. S. 396 .....16, 23, 25

Borough of Bellevue vs. Ohio Valley Water Co., 91 Atl. Rep. 236 (note b)..... 23

Central R. &. B. Company vs. State of Georgia, 54 Ga. 404, 420, 422..... 10

Charleston-Isle of Palms Traction Co. vs. Shealey, 266 Fed. Rep. 406 .....16, 17

Chattanooga R. & C. R. Co. vs. Cincinnati, N. O. & T. P. Ry. Co., 44 Fed. 465 (3)..... 23

City and County of Denver vs. N. Y. Trust Co., 229 U. S. 123, 142 11

Cleveland Elec. R. Co. vs. Cleveland, 204 U. S. 116.....6, 8, 13, 14, 16, 18, 20, 25

Columbus Railway, Power & Lt. Co. vs. Columbus, 249 U. S. 399, 406, 407..... 6, 22

Crawford vs. Crawford, 139 Ga. 394 (4), 396, 399..... 11

Denver vs. Denver Union Water Co., 246 U. S. 178.....12, 15

Detroit U. R. Co. vs. Detroit, 229 U. S. 39.....6, 11, 13, 14, 16, 18, 20

Detroit vs. Detroit City R. Co., 134 U. S. 368 (note a)..... 21

Elliott on Contracts, Section 1871 (note b)..... 22

Erie Railroad Co. vs. Board of Pub. Utility Commissioners, 254 U. S. 394, 411 .....17, 24

Fort Smith Lt. & Traction Co. vs. Fargan Bourland, 267 U. S. 300 24

Freeport vs. Freeport Water Co., 180 U. S. 578, 600 (note a) 21

Georgia Code Section 2215 10

Georgia Code Section 2662 7

Georgia Railway & Power Co. vs. Railroad Commission of Georgia, 149 Ga. 1 6

Georgia Railway & Power Company vs. Town of Decatur, 152 Ga. 143 7

Georgia Railway & Power Company vs. City of Decatur, 262 U. S. 433 7

Gilschrist vs. Waycross St. & Suburban Ry. Co., 246 Fed. Rep. 952 17

Home Tel. & Tel. Co. vs. City of Los Angeles, 211 U. S. 265 21

(Kenny vs. Knight, 119 Fed. R. 475 [2]) 12

Knoxville Water Co. vs. Knoxville, 189 U. S. 434 (note a) 21

Jones vs. Newport News, 65 Fed. 736, 841 (2) 19, 22

Joliet Bottling Co. vs. Joliet Citizens Brewing Co., 98 N. E. 263 (note b) 23

Michigan Mutual Life Ins. Co. vs. Thompson, 266 Fed. 973 (3) 23

Munn vs. Illinois, 94 U. S. 113, 192 17

McCullough-Dalzell Crucible Co. vs. Philadelphia Co., 72 Atl. Rep. 633 23

Omaha Electric Light & P. Co. vs. City of Omaha, 179 Fed. 455 (3), 460 11

Railroad Commission of California and City of Los Angeles vs. Los Angeles Ry. Corp., rendered Dec. 2, 1929.. 21

Railroad Commission of Ga. vs. Macon Ry. & Lt. Co., 151 Ga. 256 25

Railroad Commission of Texas vs. Eastern Texas Rd. Co., 264 U. S. 79, 86 ..... 6, 16

Rockwith vs. St. Road Bridge Co., 108 N. W. 785 11

Risley vs. City of Utica, 179 Fed. 885 12

San Antonio Street Ry. Co. vs. State of Texas, 35 L. R. A. 662, 30 S. W. 926 17

Southern Bell Tel. & Tel. Co. vs. Railroad Commission of South Carolina, 280 Fed. 901, 902 (7) 17

Stanley vs. Stembridge, 140 Ga. 750 (5), 754, 757 11

State of Iowa vs. Old Colony Trust Co., 215 Fed. 307, 313 16

State of Montana & Knight vs. Power Co., 44 L. R. A. 692, 22 Montana 391, 65 Pac. 685 17

State of Texas vs. Eastern Texas R. Co., 264 U. S. 123, 142 ..... 19, 23

Stiles vs. Citizens Elec. Co., 19 L. R. A. (N. S.) 865; 199 Mass. 294; 85 N. E. 419 17

Sutton vs. Hiram Lodge, 83 Ga. 770 11

Southern Iowa Electric Co. vs. City of Chariton, 255 U. S. 359 (note a) 21

Texas & P. R. Co. vs. Marshall, 136 U. S. 393 ..... 19, 21, 22, 23, 26

Texas & P. R. Co. vs. Scott, 77 Fed. 726 (2), 730 19

Turnpike Co. vs. Illinois, 96 U. S. 63 11

Turtle Creek Borough vs. Penn. Water Co., 99 Atl. 199 (note b) 22

United States Judicial Code Sec. 344 (b) 6

Virginia Cannon Toll Rd. Co. vs. People, 22 Col. 429; 37 L. R. A. 711, 718, 719 11

West End & Atlanta St. Rd. Co. vs. Atlanta St. Rd. Co., 49 Ga. 151 (1) 10

Western U. Tel. Co. vs. Fain & Parrott, 52 Ga. 19, 22 12

Wyandotte Elec. Lt. Co. vs. Wyandotte, 124 Mich. 43; 82 N. W. 821 11

GEORGIA POWER COMPANY,
Petitioner

vs.

CITY OF DECATUR,
Respondent.

No. 363

Supreme Court
of the
United States

BRIEF OF GEORGIA POWER COMPANY

STATEMENT OF CASE

The City of Decatur (a Municipal corporation of the State of Georgia) brought its equitable petition against the Georgia Railway & Power Company and the Georgia Railway & Electric Company (subsequently consolidated into the Georgia Power Company) to enjoin the street railway companies from ceasing to operate its line (known as Atlanta Rapid Transit Line or the North Decatur Line) within the corporate limits of Decatur. Said suit sought to compel continued, perpetual and never ending street railway operation within said Municipality; founding it exclusively upon a certain Municipal rate contract of April 1, 1903. (See paragraph 31 of the petition; page 75 printed record.)

The petition among other things alleged:

That on the 4th day of September, 1899, the Town of Decatur (now City of Decatur) granted a franchise to "Collins Park & Belt Railroad Company" and that under said franchise the line in question was constructed and being operated; said line being known as Rapid Transit or North Decatur line. (See paragraph 7 of the petition; printed record page 65.)

The Municipality did not allege or claim that said Municipal franchise required perpetual, never ending street railway operation.

The petition alleged that, subsequent to the granting of said franchise and on April 1, 1903, the City of Decatur and

the street railway companies entered into a rate contract wherein the street railway companies agreed to never charge more than five (5) cents for one fare upon the said Rapid Transit line.

That the street railway companies, by proper corporate action, had undertaken to end, surrender or terminate its franchise and contract and to cease any further operation within the Municipality; that in pursuance thereof they had served written notice upon the Municipality that the street railway companies would discontinue street railway operation of said Rapid Transit line on the 30th day of September, 1925. Therefore, the Municipality of Decatur instituted its present equitable action against the street railway companies, to compel continued, perpetual, never ending street railway operation within the Municipality of Decatur, basing its said suit *entirely* upon the Municipal rate contract of April 1, 1903. (See page 75 printed record, paragraph 31 of petition.)

The street railway companies, the Georgia Railway & Power Company and Georgia Railway & Electric Company, (subsequently consolidated into the Georgia Power Company) by answer and cross bill, showed that the street railway line in question, within the Municipality of Decatur, was constructed and being operated under the franchise of September 4th, 1899, granted to "Collins Park & Belt Railroad Company"; said line having been acquired by the Georgia Railway & Electric Company; that on April 1, 1903, the Georgia Railway & Electric Company and the Town of Decatur entered into a rate contract fixing a five (5) cents rate of fare thereon; that neither the franchise nor the rate contract placed a never ending obligation on the street railway company to perpetually operate in Decatur. That the street railway companies, by corporate action, had surrendered, terminated and ended said franchise and rate contract in question, and surrendered all their rights to continue operation thereunder. That the action on the part of the Municipality in refusing to accept such surrender was illegal and unconstitutional. The rate of fare charged under the rate contract was not sufficient to pay bare operating expenses, the cost of rendering the service being two (2) cents per passenger more than the fare it could charge therefor.

That the said rate of fare was both confiscatory and discriminatory. That proper corporate action had ended, terminated and surrendered the Decatur franchise and contract; that they did not require continued and perpetual, never ending street railway operation and that the property of the street railway company would be continually and perpetually confiscated in violation of the 14th amendment of the Constitution of the United States, if the action brought by the Municipality was upheld and the street railway companies restrained from and denied the right to end, terminate and surrender the franchise and contract were not permitted to cease further operation thereunder; that compelled never ending operation would result in never ending confiscation of the property of the street railway companies.

The answer alleged that in former litigation the street railway companies, while continuing to operate under the contract in question, had undertaken to compel the Georgia Public Service Commission to fix a reasonable rate of fare, but that the Supreme Court of the State of Georgia had held that the line in question was a separate and distinct classification from the other lines placed under the Commission's jurisdiction and, that the Public Service Commission had been given no jurisdiction to fix the fare to be charged thereon; that then, the street railway company, while operating under the contract, itself undertook to raise the rate of fare; that said action on the part of the street railway company had been enjoined by the City of Decatur. In this litigation the charter power of the Municipality to enter into a rate contract had been upheld, and it was also held that the said line in Decatur was a separate and distinct classification from the other street railway lines. The right to entirely discontinue the operation of said line in Decatur is involved in the present litigation.

That the City of Decatur had recently secured a charter amendment authorizing it to pave its streets along which the line in question was being operated, and assess paving costs against the street railway company operating thereon. The street railway company had requested the Municipality to relieve it from such burdens. On account of the facts alleged in the answer and cross bill the street railway company could re-

ceive no benefits from said street paving. That the City of Decatur had refused all requests to relieve the street railway company from the paving assessment, and were proceeding to pave said streets; that if the company was compelled to continue operation the City of Decatur would assess an amount of over $14,000 against the street railway company and from the facts (detailed in the answer) such assessment would further confiscate the property of the street railway company in violation of the 14th Amendment of the Constitution of the United States. The answer and cross bill alleged that such assessment gave the street railway company an additional right to cease entire operation within the Municipality of Decatur, as neither the Municipal franchise nor the Municipal rate contract compelled perpetual, never ending street railway operation within the Municipality and the line did not even make operating expenses, without the additional burden of the paving assessment.

The street railway company tendered and offered the City of Decatur its entire street railway line and property located, constructed and operated within the said Municipality under the Municipal franchise or contract in question. (Printed record page 93.)

The street railway company also prayed, in its answer and cross bill, that, under the facts therein set out, the Court declare said contract or franchise ended, terminated, and surrendered and that it be relieved from further operation thereunder.

The case was heard before the Superior Court of DeKalb County upon an agreed statement of facts. The facts set up in the answer and cross bill being introduced and taken as evidence. (Printed record pages 60-61.)

The evidence in the case was undisputed and showed: That the five (5) cents rate of fare was both confiscatory and discriminatory; that continued or compelled operation would confiscate the property of the street railway company without the paving assessment; and, that the paving assessment would occasion further or additional confiscation; that the street railway company had taken proper corporate action terminating,

ending and surrendering all its right to future or further operation within the Municipality of Decatur.

The trial court entered a final decree and adjudged that the street railway companies be and are enjoined as prayed in the petition. (Printed record page 96.) The effect of said decree was to hold, that the Municipal rate contract of April 1, 1903, required perpetual, never ending street railway operation within the Municipality of Decatur; that said rate contract was a perpetual, never ending one and could never be ended, terminated or surrendered by the street railway companies.

The Supreme Court of the State of Georgia, the highest court of the State in which a decision could be had, upheld the decision of the trial court and based its decision exclusively and entirely upon the Municipal rate contract of April 1, 1903. (For this decision see printed record pages 97-103.)

FEDERAL QUESTION INVOLVED

Unless the Municipal rate contract of April 1, 1903, *itself*, compels perpetual never ending street railway operation, and cannot be ended or terminated, the effect of the decision of the Supreme Court of the State of Georgia is to deprive the street railway company of its property without due process of law in contravention of the 14th Amendment of the Constitution of the United States. The admitted and undisputed facts establish the proposition that compelled, continued and perpetual operation requires the street railway company to perpetually render a public utility service at both a confiscatory and discriminatory rate of fare, resulting in continual and never ending confiscation of the property of the street railway company, in violation of the 14th Amendment of the Constitution of the United States; and that such compelled operation will also subject it to other confiscatory burdens in contravention of the 14th Amendment of the Constitution of the United States.

Such constitutional questions being specifically raised, in the case at bar, this Court determines for itself, the extent and duration of the Municipal franchise and rate contract and whether they are still in existence; whether they are perpetual, or whether they have expired, or been performed, terminated or surrendered.

Federal Judicial Code Section 344 (b), (formerly Judicial Code Section 237, as amended by the Act of February 3rd, 1925).

Railroad Commission of Texas vs. Eastern Texas Railroad Company, 264 U. S. 79, 86.

Columbus Railway, Power & Light Company vs. Columbus, 249 U. S. 399, 406, 407.

See also the following cases decided by this Court, in which similar questions to the one involved in the case at bar were brought to this court for review, and the decisions therein rendered by this Court, we respectfully submit, are controlling in favor of the contentions of the Georgia Power Company hereinafter discussed.

Cleveland E. R. Co. vs. Cleveland, 204 U. S. 116.

Detroit U. R. Co. vs. Detroit, 229 U. S. 39.

Blair vs. Chicago, 201 U. S. 400.

FORMER LITIGATION

In 1918 the street railway company brought a mandamus suit to compel the Railroad Commission of the State of Georgia (now Georgia Public Service Commission) to assume jurisdiction and fix fares over various street railway lines. The City of Decatur contended that the Decatur Municipal rate fare contract of April 1, 1903, separated it from the other street railway lines and franchises, and that the Georgia Legislative Act of 1907 (Georgia Code Section 2662) conferring jurisdiction upon the Georgia Public Service Commission, had, in its proviso, exempted said line from the commission's jurisdiction.

The Supreme Court of the State of Georgia upheld the said contention of the Municipality of Decatur.

Georgia Railway & Power Company vs. Railroad Commission of Georgia, 149 Ga. 1.

The street railway company itself then sought to change the Decatur rate of fare and notified the City of Decatur that it would charge an increased rate of fare after a certain date. The City of Decatur brought a suit to enjoin such increase, contending that the street railway company had no power or

authority to change its rate of fare; that, while the street railway company continued to operate under the Municipal rate contract, it could not exercise such rights and at the same time escape or relieve itself from the burdens and obligations therein imposed.

In said litigation the questions decided were whether the Municipality of Decatur had charter power to make or enter into a rate contract; and whether the proviso of the Georgia Act of 1907 (Georgia Code Section 2662) made an unreasonable and unconstitutional classification.

The Georgia Supreme Court held that the street railway company was invested with no powers to change its fares; that the Municipality of Decatur had charter powers to enter into a rate contract; that there was no unreasonable classification in exempting the Decatur line in question from the jurisdiction of the Georgia Public Service Commission.

Georgia Railway & Power Company vs. Town of Decatur, 152 Ga. 143; same case in 153 Ga., on final hearing.

Said decision of the Georgia Supreme Court (as to the above questions) was affirmed by this Court.

Georgia Railway & Power Company vs. City of Decatur, 262 U. S. 433.

In said former litigation the power and authority of the parties to enter into a rate contract has been upheld. The record in such former litigation was not introduced in evidence and is not a part of the record in this case, as, what was there adjudicated does not affect the questions here raised.

In the present litigation the power and authority of the parties to enter into a rate contract is not raised, and neither is the street railway company, while continuing to operate under the franchise or contract, undertaking to charge a rate of fare different from that therein provided.

The present litigation involves the right of the street railway company to surrender or terminate the franchise or contract; whether or not it has expired, been terminated or ended; and whether the street railway company can *perpetually* be compelled to operate thereunder at a confiscatory rate of fare.

A similar situation existed in the case of Cleveland Electric R. Co. vs. Cleveland, 204 U. S. 116, 130. There it appeared that the Supreme Court of the United States had twice theretofore rendered opinions upholding the validity of the Municipal rate contract, so when the case was again brought before this Court it said: "Therefore, in deciding this case, we assume the validity of the contract whatever it is that was made. The only question involved herein is one of construction and intent." This Court then decided for itself the duration of the various Municipal franchises and rate contracts therein involved.

QUESTION BEFORE THIS COURT FOR ITS DETERMINATION

The facts in the case being undisputed the question for decision by this Court is purely a question of law, to-wit:

Whether the Decatur Municipal franchise of September 4th, 1899, and/or the Decatur Municipal rate contract of April 1, 1903, compelled perpetual, never ending street railway operation within the Municipality of Decatur; and whether the said franchise and contract are such perpetual, never ending contracts as can never be ended, terminated or surrendered by the street railway company?

ASSIGNMENTS OF ERROR

The specifications of error set out in the certiorari, granted by this Court, are as follows, to-wit:

(1) The Supreme Court of the State of Georgia erred in finding and holding that the Municipal rate contract of April 1, 1903, requires perpetual, never ending street railway service within the Municipality of Decatur and that said contract was a perpetual, never ending one.

(2) The Supreme Court of the State of Georgia erred in not holding that the contract of April 1, 1903, had been performed, expired or terminated, or legally surrendered, and erred in holding that said contract could not be terminated, ended or surrendered by the street railway companies ceasing to operate within the Municipality.

(3) The Supreme Court of the State of Georgia erred in not holding that the Municipal rate contract of April 1, 1903, should be construed in connection with the franchise of September 4, 1899, and that said franchise and contract had been performed, expired, terminated or legally surrendered.

(4) The Supreme Court of the State of Georgia erred in not holding and finding that said contract of April 1, 1903, referred and applied to street railway lines as operated under the franchise of September 4th, 1899, and that said contract taken in connection with said franchise, or said Municipal contract taken alone, did not require perpetual, never ending street railway operation within the Municipality of Decatur.

In considering the said assignments of error we first discuss the Municipal franchise of September 4th, 1899, under which the line in question was constructed and operated, although we do not believe, the attorneys for the Municipality will contend that it compelled continued further operation.

THE FRANCHISE UNDER WHICH THE LINE IN QUESTION WAS CONSTRUCTED AND BEING OPERATED HAS EXPIRED AND BEEN TERMINATED BY TIMELY WRITTEN NOTICE.

The line in question was built, constructed and being operated under a franchise from the Town of Decatur to the "Collins Park & Belt Railroad Company." Said Municipal franchise was granted on September 4th, 1899, to "Collins Park & Belt Railroad Company" and was *not* a grant to said Company, *its successors and assigns.*

(See agreed statement of facts, printed record pages 6-8, where the entire franchise is set out.)

In 1900 the name of the "Collins Park & Belt Railroad Company" was changed to "Atlanta Rapid Transit Company."

In 1902 the "Atlanta Rapid Transit Company" conveyed all its property, together with its different lines of street railway to the "Georgia Railway & Electric Company." (See printed record page 13.)

The change of the name of "Collins Park & Belt Railroad

Company" to "Atlanta Rapid Transit Company" and the deed from Atlanta Rapid Transit Company to Georgia Railway & Electric Company are only material as showing the chain of title of the franchise in question into the Georgia Railway & Electric Company.

When, the said franchise had a further duration of over 16 years (and on the 1st day of April, 1903) the Georgia Railway & Electric Company entered into a contract with the Town of Decatur fixing a five (5) cents rate of fare to be charged on said line designated and specifically described in said contract as the Rapid Transit Line.

The franchise in question expired August 16, 1919; *and thereafter continued operation thereunder, since said date, has been similar to a tenancy at will or at sufferance.*

"The Collins Park & Belt Railroad Company" was incorporated under the Acts of the General Assembly approved by the Legislature of Georgia on August 16, 1899.

(See agreed statement of facts, printed record pages 1-5, where the entire Act is set out.)

The duration of its charter was not therein specifically set out, therefore, under the laws of Georgia, its charter expired 30 years from the date of its grant or 30 years from August 16, 1889, i. e. August 16, 1919.

Georgia Code 2215 provides:

> "Corporations have continuous succession during the time limited by their charter, notwithstanding the death of their members. Should any charter granted in future by the General Assembly to a private corporation be silent as to its continuance, such charter shall expire at the end of 30 years from date of its grant."

See also:

West End & Atlanta St. R. Co. vs. Atlanta St. R., 49 Ga. 151 (1).

The Central R. & B. Company vs. State of Georgia, 54 Ga. 404, 420, 422.

The franchise in question granted on September 4th, 1899,

to the "Collins Park & Belt Railroad Company" contained *no* words of grant to its heirs, successors or assigns.

(Printed record, pages 6-8, where the entire franchise is set out.)

Under all the authorities, the duration of such franchise, is for and during the charter life of the Company, therefore, the said municipal franchise of the said Rapid Transit line in Decatur expired August 16, 1919.

Turnpike Co. vs. Illinois, 96 U. S. 63.

Blair vs. Chicago, 201 U. S. 400.

Omaha Electric Light & P. Co. vs. Omaha, 179 Fed. 455 (3), 460.

Wyandotte Elec. Lt. Co. vs. City of Wyandotte, 124 Mich. 43; 82 N. W. 821.

Rockwith vs. St. Road Bridge Co., 108 N. W. 785.

The conveying of this franchise to successive street railway companies did not change its duration, and is immaterial except as showing title thereto.

Virginia Cannon Toll Road Co. vs. People, 22 Col. 429; 37 L. R. A. 711, 718, 719.

Blair vs. Chicago, 201 U. S. 400, see pages 481, 482.

The said Decatur franchise having expired on August 16, 1919; subsequent operation thereunder within the Municipal limits of Decatur constituted a relationship between the said Municipality and the operating street railway company similar to that of a tenancy at will.

Omaha Electric Light & Power Company vs. City of Omaha, 179 Fed. 455 (3), 460.

Detroit United Ry. Co. vs. City of Detroit, 229 U. S. 39, 42.

City and County of Denver vs. New York Trust Co., 229 U. S. 123, 142.

Or a tenancy at sufferance.

Sutton vs. Hiram Lodge, 83 Ga. 770.

Standley vs. Stembridge, 140 Ga. 750 (5), 754, 757.

Crawford vs. Crawford, 139 Ga. 394 (4), 396, 399.

Either of such tenancies can be terminated by either party by reasonable notice.

Denver vs. Denver Union Water Co., 246 U. S. 178, 184.
Western U. Tel. Co. vs. Fain & Parrott, 52 Ga. 19, 22.

On the question of notice see also:

Risley vs. City of Utica, 179 Fed. 885, and cases there cited.

In a tenancy at will or a tenancy at sufferance a party while continuing to occupy the premises cannot escape the burdens incident thereto; but either party can terminate such burdens and put an end to such further, continued relationship by notice.

Kenny vs. Knight, 119 Fed. R. 475 (2).

All the authorities hold that operation under an expired Municipal franchise creates an exactly similar relationship.

See cases heretofore cited.

The street railway companies took proper corporate action terminating and surrendering the franchise in question.

(See printed record pages 42-47.)

Proper and reasonable notice of such action was given to the Municipality, the only party upon whom such notice could be served.

(See printed record pages 42-47.)

The franchise having expired and the holding over having been terminated by due and reasonable notice, it is inconceivable how the City of Decatur can sustain the decree perpetually enforcing continued street railway operation.

It certainly would not be held that a landlord could successfully maintain a suit in equity and by injunction *perpetually* compel a tenant at will or sufferance to continue to occupy his premises because the landlord desired to enjoy for *all time to come* the benefits he was receiving by such continued occupancy. Yet, that is exactly what is done by the decision in question.

We have found no case in conflict with the legal principles just heretofore discussed.

We respectfully submit, that the Supreme Court of Georgia in effect, admits the legal contention just heretofore stated, to-wit; that the franchise in question has expired, terminated and ended; for, that Court in its opinion said "It is not so much the franchise we are dealing with, but the specific contract made in pursuance thereof"; and then based its opinion upon the contract of April 1, 1903.

(See printed record page 101.)

We submit that under a number of decisions of this Court the *duration* of the franchise and the right to surrender it, is decisive of the duration and the right to surrender a contract *made with* reference thereto.

Cleveland E. R. Co. vs. Cleveland, 204 U. S. 116, 130.

Detroit U. R. Co. vs. Detroit, 229 U. S. 39.

Blair vs. Chicago, 201 U. S. 400.

The contract of April 1, 1903, in referring to the Rapid Transit line did not undertake to change the duration of the franchise under which said line was being operated or the right of the parties to terminate it or cease operation thereunder.

This Court has repeatedly held that the duration of Municipal franchises and contracts cannot be extended by *implication.*

Detroit U. R. Co. vs. Detroit, 229 U. S. 39, 43, 44.

Blair vs. Chicago, 201 U. S. 401, 471, 474.

MUNICIPAL CONTRACT OF APRIL 1, 1903

Said Municipal rate contract is set out in full on pages 13-19, printed record.

We respectfully submit that an unbroken line of decisions of this Court hold that contracts similar to the Municipal rate contract of April 1, 1903, does not extend the duration of the then existing Municipal franchise.

In cases in which this Court has had Municipal contracts,

(with much broader provisions than those contained in the contract of April 1, 1903) before it for consideration, it has in every case held that such contracts did not extend or enlarge the duration of the former Municipal franchise.

Cleveland Electric R. Co. vs. Cleveland, 204 U. S. 116.
Detroit U. R. Co. vs. Detroit, 229 U. S. 39.
Blair vs. Chicago, 201 U. S. 400.

In said cases it was the street railway company which contended that certain Municipal contracts (entered into between the street railway company and the Municipality) had the effect of extending the duration of former Municipal franchises; and that under such Municipal contract the street railway company had been given the right and authority to *continue* operation upon the streets in the Municipality. We respectfully submit, that the Municipal contracts under consideration in each of said cases were more susceptible of such construction, than is the Municipal rate contract in the case at bar. Nevertheless this Court, in each case, held, that under the principle of law as repeatedly announced by it, it was impossible to hold that the Municipal contract extended the duration of the franchise and therefore the street railway company only had the right to operate within the Municipality for and during the franchise period. For instance see the case of Detroit U. R. Co. vs. Detroit, 229 U. S. 39, 43-45 (where former cases of this Court are quoted and discussed). It is, of course, immaterial, that in the case at bar, it is the street railway company which contends that the Municipal rate contract in question does not extend the duration of its franchise; and that, therefore, under such Municipal rate contract it cannot be required to render perpetual, never ending operation and service.

Such Municipal rate contracts are to be similarly construed, whether the street railway company is contending that it has the right to further operate thereunder, or is denying the Municipality's right to compel never ending operation thereunder.

Applying the principle of law (as announced in the cases of this Court just heretofore cited) to the Municipal rate contract involved in the case at bar, then as held by this Court in

the case of Denver vs. Denver Union Water Company, 246 U. S. 178, 184: "It is a necessary corollary that the Company may discontinue its service at will."

The Municipal rate contract of April 1, 1903, did not *expressly or by implication* extend the duration of the franchise, under which the line in question was constructed and being operated within the City of Decatur, and did not and could not affect franchises from other Municipalities.

This contract first deals with discontinuance and removal from the streets of Decatur of a line of track known as the Atlanta Railway Company and required the street railway company upon such removal to restore the surface of the streets in good condition. There is no contention that the franchise of the Atlanta Railway Company in Decatur had not expired long prior to the present litigation. The discontinuance of the Atlanta Railway Company's line 26 years ago (in 1903) does not affect the duration of the franchise of the Atlanta Rapid Transit line.

The other parts of the said contract by actual terms and description relate and refer to "Atlanta Rapid Transit Line." There is not a word or line which, either *expressly or by implication*, deals with or undertakes to extend the duration of the franchise of said Rapid Transit Line. The *length* of time said line *must* operate in Decatur is not extended. When the contract of April 1, 1903, was made it did not and was not intended to cover or deal with such questions. The Decatur Municipal franchise, under which the Atlanta Rapid Transit Line was being operated had not expired; by its own terms it was to continue for a further duration of 16 years. The said contract of April 1, 1903, was not intended to and did not (either expressly or by implication) undertake to modify, enlarge or change, or deal with that question.

We respectfully submit that the contract of April 1, 1903, in no way changed the duration of the Municipal franchise of Atlanta Rapid Transit Company line (heretofore discussed) or the rights of the parties with reference to its termination or surrender.

The Supreme Court of Georgia largely relied upon the ex-

pression of the contract "to never charge more than five cents for one fare."

The provision of the contract is "to never charge more than five cents for one fare, upon *its Decatur line* above referred to as the *Rapid Transit Line.*" (The said line in Decatur is then described in detail.)

It will be seen that said provision or contract as to the rate of fare was made with reference to the line already constructed and in operation. It fixed the rate of fare while the line was operating. Such provision did not undertake to compel perpetual and never ending operation.

This exact question was before this Court in the case of Cleveland E. R. Co. vs. Cleveland, 204 U. S. 116, in which it was held that the Municipal rate contract did not change the duration of the franchise.

See also:

Detroit U. R. Co. vs. Detroit, 229 U. S. 39, 43, 44, 45.

In Charleston-Isle of Palms Traction Co. vs. Shealey, 266 Fed. Rep. 406, the Court held that a five (5) cents rate of fare was fixed by contract; and that the street railway company was bound thereby while it operated thereunder; but, also further held; that the street railway company had the constitutional right to cease operation thereunder and thus avoid the confiscatory rate.

As to such right to discontinue operation, see also:

Railroad Commission of Texas vs. Eastern T. R. Co., 264 U. S. 79, 85, 86.

In the case of Brooks-Scanlon Co. vs. Railroad Commission of La., 251 U. S. 396, this Court held: "A carrier cannot be compelled to carry on even a branch of business at a loss."

In the case of State of Iowa vs. Old Colony Trust Company, 215 Fed. 307, 313 (cited approvingly by this Court in many cases), the Court held that "A railroad company may abandon an unprofitable and irreclaimable part of its road and neither the State nor unfortunate investors along the line can justly complain."

In the case of Munn vs. Ilinois, 94 U. S. 113, 192, this Court said:

> "The grantor may withdraw his grant by discontinuing the use; but so long as he maintains its use, he must submit to the control."

To the same effect see:

Erie Railroad Co. vs. Board of Public Utility Commissioners, 254 U. S. 394, 411.

It has been repeatedly held that a street railway company can surrender such a franchise as the one in question to the Municipality which granted it.

Stiles vs. Citizens Electric Street Railway Co., 19 L. R. A. (N. S.) 865; 199 Mass. 294, 85 N. E. 419.

State of Montana & Knight vs. Power Company, 44 L. R. A. 692; 22 Montana 391; 65 Pacific 685.

San Antonio Street Railway Company vs. State of Texas, 35 L. R. A. 662; 30 S. W. 926.

Charleston-Isle of Palms Traction Co. vs. Shealey, 266 Fed. 406.

Southern Bell Tel. & Tel. Co. vs. Railroad Commission of South Carolina, 280 Fed. Rep. 901, 902 (7).

Gilschrist vs. Waycross Street & Suburban Railroad Co., 246 Fed. Rep. 952.

The Supreme Court of the State of Georgia said:

> "When this contract was before the Supreme Court of the United States (262 U. S. 438 supra) the Court said with reference to the duration of this contract, 'that this contract would remain effective until there should be conflicting legislative action'."

That case arose over an endeavor on the part of the street railway company, while operating under the franchise to change the contract rate of fare as added to the franchise by the contract of April 1, 1903. The street railway companies had served notice on the Municipality of Decatur that on and after October 20, 1920, it (the street railway company) would charge a seven (7) cents rate of fare on the said North Decatur or Rapid Transit Line. The Municipality of Decatur then brought an equitable suit to enjoin the street railway company, while

operating under the franchise in Decatur, from changing the rate of fare, as provided in the contract. In answer to such suit the street railway company contended lack of power and authority in the Town of Decatur to make a rate contract; that the rate of fare provision was not a contract.

The decision of this Court shows that it was dealing with such questions and not with the right of the *Municipality to compel perpetual, never ending operation thereunder.*

The question there decided is entirely different from the one involved in the present litigation. As controlling on this question see:

Cleveland Electric R. Co. vs. Cleveland, 204 U. S. 116, 130.

The Supreme Court of the State of Georgia says that the contract of April 1, 1903, if not expressly, *impliedly* gives consent to the operation of the line in question within the Municipality.

The provision of the contract to which the Supreme Court of Georgia was referring is as follows:

> "To gradually from time to time, as it may obtain permission so to do and may have funds available for such purpose, double track said Rapid Transit Line from terminus to terminus, the loop already being described in the Town of Decatur being considered a double track; provided the time within which said double track shall be completed does not exceed five years in the event it can obtain permission to construct said double track, which said double track, when completed shall be maintained in a substantial, safe and expeditious manner and shall be operated with cars and rolling stock kept in safe and comfortable condition. Permission to construct said double track in the Town of Decatur is hereby granted."

That such and similar provisions do not extend the duration of the franchise (the franchise of September 4, 1899, heretofore discussed) was held by this Court in Cleveland Electric R. Co. vs. Cleveland, 204 U. S. 116.

See also:

Detroit U. R. Co. vs. Detroit, 229 U. S. 39, 44, 45.

Blair vs. Chicago, 201 U. S. 400.

The said provision of the contract was not an undertaking on the part of the parties to change or affect the duration of the franchise under which the line was being operated.

The agreed statement of facts show that no double track was laid within the Municipality of Decatur under it; however, this is immaterial for as held in the Cleveland case (204 U. S. 116, 137-140), a right given to construct an additional track would not extend the duration of the franchise under which the single line has been constructed. In fact, the contract in question, provides that the loop in Decatur (as already constructed) was to be considered a double track. Nothing said in said contract was intended to affect the duration of franchises received from other Municipalities. While operating, a legal duty rests upon the company to maintain its tracks in a safe and expeditious manner and to keep its cars and rolling stock in good and comfortable condition. This, however, does not compel perpetual, never ending operation at a loss.

State of Texas vs. Eastern Texas R. Co., 264 U. S. 79, 85.

Also see:

Texas & P. R. Co. vs. Marshall, 136 U. S. 393.

Jones vs. Newport News, 65 Fed. 736, 741 (2).

Texas & P. R. Co. vs. Scott, 77 Fed. 726 (2), 730.

In the case of Cleveland E. R. Co. vs. Cleveland, 204 U. S. 116, 133, the grants then being considered by this Court specifically referred to lines which were to be operated in connection with other and different lines. Nevertheless this Court held that such reference did not have the effect of extending the duration of any line, though the lines referred to had franchises of longer duration.

Let us assume that on September 4th, 1899, the City of Decatur, as landlord, had rented certain of its property to a person, as lessee. The lease provided that said property was to be used for hotel purposes and that the duration thereof was for a period of 30 years. Subsequent thereto and on April 1, 1903 (sixteen years prior to the expiration of said lease), the landlord and tenant had entered into a contract with reference to said hotel property; by which the tenant, for a valuable con-

sideration, agreed "to never charge its guests more than a rate of $1.00 per room"; and also agreed "to put an elevator in the hotel and from time to time paint or repaper the rooms, and to maintain and operate the hotel in a safe and comfortable manner"; certainly such supplemental contract, of April 1, 1903, would not be held to change the duration of the original lease and convert it into a perpetual, never ending one. Such supplemental contract of April 1, 1903, would be taken and construed in connection with the duration of the original lease.

Occupancy of the premises by the tenant, after the expiration of the lease, would, of course, subject the tenant to the burdens or obligations incident to such continued occupancy. However, such continued occupancy would not give the tenant the legal right to claim a perpetual, never ending lease. Similarly, the landlord could not require the tenant to perpetually continue as his tenant because he occupied the premises, after the expiration of the lease.

Under the authorities heretofore cited, such continued occupancy constituted a tenancy at will or at sufferance, and can be terminated by *either party* by reasonable notice.

This Court has repeatedly held that contracts similar to the contract of April 1, 1903 (involved in the case at bar), did not give the street railway company the right of perpetual, continued and never ending operation upon the streets of the Municipality and did not have the effect of extending the duration of a former Municipal franchise.

Cleveland E. R. Co. vs. Cleveland, 204 U. S. 116.

Detroit U. R. Co. vs. Detroit, 229 U. S. 39, 44, 45.

Blair vs. Chicago, 201 U. S. 400.

See also cases cited under the next head of this brief.

It follows, as a corollary, that if the street railway company cannot successfully claim that such a contract gives it the right to perpetual, never ending operation upon the streets of the Municipality; then the Municipality (basing its action on the same or a similar contract) cannot compel the street railway company to continual, perpetual, never ending street railway operation.

THE PRINCIPLE OF LAW REPEATEDLY ANNOUNCED BY THIS COURT IN CONSTRUING MUNICIPAL CONTRACTS

This Court has repeatedly held that Municipal rate contracts do not compel perpetual and never ending operation.

In the case of Texas & P. R. Co. vs. Marshall, 136 U. S. 393, this Court held; that a Municipal contract providing that in consideration of certain donations made by the City, a railroad agreed that it would *permanently* establish its terminus in the City was performed by maintaining it there for eight years.

Certainly, under the undisputed facts in the case at bar, the street railway company cannot be compelled to perpetually operate under the Municipal rate contract in question.

In the case of Home Telegraph & Tel. Co. vs. City of Los Angeles, 211 U. S. 265, this Court expressly held that Municipalities possessing the power and authority to make rate contracts can only make them for a definite time "not grossly unreasonable in point of time." In subsequent decisions this Court has restated and followed that legal principle. (For illustration see cases cited in note [a].)

R. R. Commission of Cal. and City of Los Angeles vs. Los Angeles Ry. Corp., rendered Dec. 2nd, 1929.

Note (a) In Southern Iowa Electric Co. vs. City of Chariton, 255 U. S. 359, the contract fixed a definite period of time, to-wit: 25 years. In the decision the Court said no one would contend that a Municipality could make "a valid contract fixing permanent rates".

In Freeport vs. Freeport Water Company, 180 U. S. 578, 600, the contract was for a definite period—30 years.

In Detroit vs. Detroit City R. Co., 134 U. S. 368, the contract was fixed for a certain definite period—30 years.

In Knoxville Water Co. vs. Knoxville, 189 U. S. 434, the Knoxville Water Company contended that there was a Municipal rate contract for a definite period of 30 years. However, the Court held that there was not a contract fixing a rate for a definite term and permitted a change in rates.

In Cleveland vs. Cleveland City R. Co., 194 U. S. 519, see pages 535, 536, the contract was entered into in February, 1885, and

The contract of April 1, 1903, was made with reference to the Rapid Transit line constructed and being operated under the franchise of September 4, 1899. The duration of said franchise was not extended by the said contract of April 1, 1903. If only the said contract itself is considered, then there is no provision in it that it is to be a perpetual, never ending contract.

If it is claimed that no limit as to duration is specified therein; then the rule of law practically universally followed is that such contracts can be terminated after reasonable length of time and upon reasonable notice.

In Jones vs. Newport News & M. Co., 65 Fed. 736, Judge (now Chief Justice) Taft held:

> "The petition makes no better case for the plaintiff on the theory of a contract than on a common law liability. It is not alleged that either the defendant or its predecessor agreed to keep the switch on the main line for any definite length of time, or that either expressly agreed to keep it there forever; the plaintiff contends, that, nothing having been said as to the time, the implication is that the switch is to be maintained at all times—forever. Such a construction is quite at variance with the views of the Supreme Court, as expressed in Texas & P. R. Co. vs. Marshall, 136 U. S. 393; 10 Sup. Court 846."
> See also cases in Note (b).

---

continued until February, 1908, 23 years. In the opinion the Court says the provision as to rates of fare were fixed...for a stated time.

In Columbus R. Co. vs. Columbus, 249 U. S. 399, the rate contract was for a definite time—25 years.

Note (b) In 3 Elliott on Contracts, Sec. 1871, the rule is laid down as follows:

"Even though there is no express provisions for terminating a contract which is indefinite in duration and continuous in its nature, there is usually an implied option in either party to terminate such a contract as to the part remaining executory."

Barney vs. Indiana Ry Co. et al., 61 N. E. 194.

Turtle Creek Borough vs. Penn. Water Co., 99 Atl. 199.

Many of the decisions hold that perpetual contracts of this character will not be tolerated, that a court of equity will not compel perpetual performance.

Texas & P. R. Co. vs. Marshall, 136 U. S. 393.

McCullough-Dalzell Crucible Co. vs. Philadelphia Company, 72 Atl. Rep. 633.

The decree affirmed by the Supreme Court of the State of Georgia requires perpetual and never ending operation of the line in question under the Decatur Municipal rate contract of April 1st, 1903. Unless such contract requires such perpetual, and never ending operation, then under the undisputed facts, the street railway company's property will perpetually be confiscated in contravention of the 14th Amendment of the Constitution of the United States.

This Court has repeatedly held that railroad legislative charters (which are contracts), containing much more imperative terms than the Municipal rate contract in question, did not deprive the railroad companies of the constitutional right to cease operation thereunder, when future operation was unprofitable.

State of Texas vs. Eastern Texas R. Co., 264 U. S. 79 and cases therein cited.

Brooks-Scanlon Co. vs. Railroad Commission, 251 U. S. 396; Munn vs. Illinois, 94 U. S. 113.

In that case a Borough granted a franchise to a water company providing the company rates for domestic purposes shall not exceed a certain rate. The contract contained no definite limitation as to the time. The Court held that it was revocable upon reasonable notice under changed conditions.

Borough of Bellevue vs. Ohio Valley Water Co., 91 Atl. Rep. 236.

Joliet Bottling Co. vs. Joliet Citizens Brewing Co., 98 N. E. 263.

In Michigan Mutual Life Ins. Co. vs. Thompson, 266 Fed. 973, (3) (a decision by the Second Circuit Court of Appeals) the Court says:

"The general rule is that contracts not expressly made for a fixed period are terminable at the will of either party."

See also:

Chattanooga R. & C. R. Co. vs. Cincinnati, N. O. & T. P. Ry. Co., 44 Fed 456 (3).

The City of Decatur by virtue of compelled operation of the line in question is also further seeking to impose paving assessments against the street railway company amounting to $14,000 from which the street railway can receive no benefits. The pleadings show that the street railway company tendered to the Municipality its property located therein along and adjacent to the streets to be paved and its entire street railway property constructed and located within the Municipality of Decatur under the franchise and contract heretofore discussed. The Municipality admits that such property is not worth the amount of the assessment by refusing the tender of such property. We respectfully submit, under the principle of law laid down by this Court in the case of Erie Railroad Company vs. Public Utility Commission, 254 U. S. 394, 411, such facts give the street railway company the constitutional right to cease operation within the Municipality. In that case this Court said: "If the burdens imposed are so great that the railroad cannot be run at a profit, it can stop, whatever misfortune the stopping might produce." Certainly the Municipal rate contract in question does not deny the street railway company its constitutional right to cease operation under such facts.

The Supreme Court of Georgia cites the case of Fort Smith Light & Traction Company vs. Fargan Bourland, 267 U. S. 300. We respectfully submit that the case is not applicable; the facts in that case were as follows:

The street railway lines within the Municipality of Fort Smith were constructed and operated under a franchise from the Municipality. In 1919 the franchise, together with its obligations and requirements, was, pursuant to a statute of the State of Arkansas, surrendered for an indeterminate permit; the express provisions of which bound the street railway company to operate *all* its lines within the Municipality unless permitted to abandon a part thereof with leave of the City Commission, which exercised the powers of a public utility commission. Upon hearing, the said commission refused to allow the railway company to abandon *a part of a line.* Notwithstanding this refusal and *its continued operation under the indeterminate permit* the street railway company sought to

discontinue *part of its line.* The decision of this Court was that the street railway company by accepting the indeterminate permit had agreed to operate all of its street railway lines and could not, therefore, continue operation thereunder and escape the other burdens which it had agreed to. The concluding paragraph of the said decision is:

> "The company is at liberty to surrender its franchise and discontinue operations throughout the city. It cannot, in the absence of contract, be compelled to continue to operate its system at a loss. Brooks-Scanlon Co. vs. Railroad Commission, 251 U. S. 396. But the Constitution does not confer upon the company the right to *continue to enjoy* the franchise or indeterminate permit, and *escape from the burdens incident to its use.*"

In the case at bar the street railway company is not undertaking to operate within the Municipality of Decatur under the franchise or contract in question; but is seeking to surrender and cease operation thereunder "throughout the City."

Whether the Decatur Municipal franchise has been performed, ended, terminated or surrendered, or whether perpetual, never ending operation thereunder can be comeplled is not predicated upon the question whether other lines under other and different Municipal franchises are still being operated.

Cleveland E. & R. Co. vs. Cleveland, 204 U. S. 116.

The instant suit brought by the Municipality of Decatur seeks to compel perpetual operation under and by virtue of the contract of April 1, 1903. The said contract and franchise are separate and distinct from the other franchises and street railway lines operated in other Municipalities under franchises obtained from them. In fact the franchise in question has been held to be a separate and distinct classification from all the other lines and franchises of the street railway company.

In Georgia, the Public Service Commission has been given no jurisdiction over this line and neither has it jurisdiction to determine the question of discontinuance of service.

Railroad Commission of Georgia vs. Macon Railway & Light Company, 151 Ga. 256.

The Georgia Public Service Commission has gone as far as it could; it has expressly held that the contract in question fixed a confiscatory rate; and, additionally held that said rate of fare was discriminatory, in so far as all the other lines of the company are concerned.

Printed record page 42.

To require perpetual, never ending operation under said conditions would, to use the language of this Court in 194 U. S. 517, 534, lead "to consequences dangerous to public interest, peace and tranquillity, the extent of which it would be difficult in advance to see."

Said fact under the decision of this Court in the case of Texas & P. R. Co. vs. Marshall, 136 U. S. 393, is an additional reason why the street railway company should not be compelled to perpetually operate under said contract and should not be denied the right to surrender all its rights thereunder.

WALTER T. COLQUITT,
BEN J. CONYERS,
Attorneys for Georgia Power Company.